IN THE

Supreme Court of the United States

October Term, 1960

No. 853

GREEN FUEL ECONOMIZER COMPANY, INC.

and

NATIONAL SURETY CORPORATION,

Petitioners,

v.

ARC & GAS WELDER ASSOCIATES, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Green Fuel Economizer Company's and its surety's petition for a writ of certiorari ignores not only this Court's requirements as to the contents of a petition for such a writ, but, more particularly, the considerations that would and should move this Court to grant it. For example, as to the former, the petitioners' statement of the case, in disregard of this Court's Rule 23.1 (g), does not show the basis of Federal jurisdiction in the Court of first instance.

But more importantly, as regards the latter, it is apparent that petitioners really look upon the application for a writ of certiorari as a means of trying to obtain a second review of factual determinations on appeal,—see particularly petitioners' "SPECIFICATION OF ERRORS TO BE URGED" on page eight of their petition.

Arc & Gas Welder Associates, Inc., the respondent, brought an action to recover as sub-subcontractor on a Federal construction project, money due it on the sub-subcontract and also for additional work done at the request of and under the direction of Green Fuel Economizer Company, the subcontractor. A number of disputed factual questions were raised involving the amount, nature, and extent of the work actually done. Similarly, a number of questions were raised regarding the existence and construction of both the implied and the written contracts between the parties. Respondent claimed, and both courts below found, that the written contract, for a consideration of only $16,500, required respondent to polish the welded seams only of certain stainless steel chambers and that the implied contract covered the additional work of polishing the entire surfaces of the stainless steel plates, an operation the reasonable value of which, according to uncontradicted expert testimony, was over $75,000.

This action was tried in the United States District Court for the District of Maryland by Judge Thomsen sitting without a jury. The trial consumed 17 days, hundreds of exhibits were received, and over 2000 pages of testimony were taken. Judge Thomsen subsequently filed a careful and elaborate opinion running to upwards of forty pages in the petitioners' appendix, and entered judgment awarding the respondent considerably less than it had claimed.

On appeal to the Fourth Circuit, the case was argued fully before Judges Soper, Boreman, and Bryan. Thereafter Judge Soper filed an opinion occupying upwards of nine pages in the petitioners' appendix in which, speaking for a unanimous Court, the judgment of the District Court was affirmed.

Surely this litigation should stop here. Petitioners' real objection is that they do not agree with some of the findings of fact of the District Court which were subsequently affirmed by the Fourth Circuit. Though they have attempted in their petition here to deck these objections out as legal questions, the effort is disingenuous.*

We submit that the petition should be denied under the well-settled "two-court rule". See the host of decisions

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* For example, under the first of their "Questions Presented", petitioners advance the proposition that courts are, in effect, bound conclusively as regards usage and definition by the expression of "the relevant industry's official institute". The application of a strict rule of *stare decisis* to the private utterances of private bodies would indeed be a legal novelty of the first magnitude. What petitioners will not or can not appreciate is that the Courts below considered this statement by "the relevant industry's official institute" as some evidence, but found, as a matter of fact, that it was far outweighed by other evidence received at the trial.

The meretricious nature of petitioners' treatment of the facts here is also apparent from their quotation, at page three of the Petition, of the contract undertaking as being one "to provide labor and material for, and to do the work of 'complete erection, fabrication, testing and polishing', of the Cloud Chambers". That clause of the contract actually reads: "Complete erection, fabrication, testing and polishing of two stainless steel cloud chambers in accordance with drawings (*as per rider attached*)". [Emphasis supplied.] The meaning and effect of the attached rider were among the larger questions that had to be resolved by the courts below. On the extent of the polishing required the only provision of this attached rider read:

> "Polishing of the welds is a part of this contract. All interior surfaces welded to be polished to a #4 finish with a maximum roughness finish tolerance allowable of 42 micro inches".

Petitioners at the trial conceded that this quoted provision, which clearly *limited* respondent's polishing undertaking, referred only to polishing the welds or seams of the stainless steel cloud chambers running between the stainless steel plates of which the chambers were constructed and did not refer to the much greater work of polishing the entire surface of the plates themselves.

collected in Robertson's and Kirkham's "Jurisdiction of the Supreme Court of the United States" (1951), at p. 659, footnote 7.

The petition here contains no attempt to establish the existence of any of the usual grounds enumerated in Rule 19 for moving this Court to grant a writ of certiorari.

There is no showing that the Fourth Circuit's decision here is in conflict with the decision of any other Court of Appeals on the same matter.

There is no showing that the Fourth Circuit decided an important State question in a way in conflict with applicable State law.

There is no showing that the Fourth Circuit decided an important question of Federal law which has not been, but should be, settled by this Court.

There is no showing that the Fourth Circuit in this case decided a Federal question in any way in conflict with applicable decisions of this Court.

Nor is there any showing that the Fourth Circuit in this case has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

What the petition makes out is merely criticism of a non-conflict case of no importance to the public, the nation, or jurisprudence as a whole. There is no hint of the presence of such palpable errors, oppression, or inequity, as would move this Court to grant the writ in the general exercise of its control over the proper administration of justice. Indeed, the record clearly shows that the petitioner, Green Fuel, received full value in labor and materials for the

amount of the judgment awarded against it; and indeed the record further shows that the petitioner, Green Fuel, has, from the beginning of its first relationships with the respondent, Arc & Gas, up to the present moment, been pursuing an unjustified windfall. The only element of oppression present is that which has been borne by the respondent who has had to go for over three years without payment for additional requested work that it did and materials that it supplied in good faith.

Respectfully submitted,

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